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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARIBELL AGUILAR,
for Herself, as a Private Attorney
General, and/or On Behalf Of All
Others Similarly Situated,

Plaintiff,

v.

CARTER'S, INC., and DOES 1-10,
inclusive,

Defendants.

No. _____

CLASS ACTION COMPLAINT
FOR DAMAGES AND
INJUNCTIVE RELIEF UNDER
THE CONSUMER PROTECTION
ACT, RCW 19.86, AND FOR
INJUNCTIVE RELIEF
UNDER THE COMMERCIAL
ELECTRONIC MAIL ACT,
RCW 19.190

JURY TRIAL DEMANDED

Plaintiff MARIBELL AGUILAR, demanding trial by jury as to all issues
so triable, alleges as follows, on personal knowledge, investigation of her counsel,
and/or on information and belief, against Defendants Carter's, Inc., and Does 1
through 10, inclusive:

CLASS ACTION COMPLAINT FOR
DAMAGES AND INJUNCTIVE RELIEF- 1

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1 **I. INTRODUCTION**

2 1. Carter's is a leading retailer and manufacturer of baby and young
3 children's clothing. As alleged herein, Carter's has violated and continues to
4 violate the Washington Consumer Protection Act, RCW 19.86, and/or the
5 Washington Commercial Electronic Mail Act, RCW 19.190, by transmitting to
6 Washington consumers emails which contain false or misleading information in
7 the subject lines.

8 **II. PARTIES**

9 2. Plaintiff Maribell Aguilar is a citizen of the United States of America
10 and a citizen, resident and domiciliary of the State of Washington. Ms. Aguilar is
11 an individual and a natural adult person who currently resides and who at all
12 relevant times in the past resided in the City of Toppenish, Yakima County,
13 Washington State.

14 3. Defendant Carter's, Inc., is a corporation chartered under the laws of
15 the State of Delaware which currently has and at all relevant times in the past has
16 had its headquarters, executive office, principal place of business and/or nerve
17 center in Atlanta, Georgia. Carter's, Inc., has at least eight U.S. subsidiaries.

18 4. Defendant Does 1 through 10 are subsidiaries of Carter's, Inc., who
19 actively engaged in, ratified, contributed to, aided, abetted, benefitted from,
20 and/or are otherwise liable for the acts or omissions pled herein. It would work an
21 injustice under these circumstances to maintain the corporate separateness of
22 Carter's, Inc., and/or of any or all of the Doe Defendants. Based on information
23 and belief, Carter's, Inc., so dominates the operations, strategies, revenues, and/or
24

1 costs of any or all of the Doe Defendants, such that said Doe Defendants are mere
2 instrumentalities of Carter's, Inc. Plaintiff currently does not possess and cannot
3 obtain the detailed company and other factual information necessary to determine
4 which, if any, of the Doe Defendants actively engaged in, ratified, contributed to,
5 aided, abetted, benefitted from, and/or are otherwise liable for the acts or
6 omissions pled herein. Plaintiff will promptly engage in discovery to uncover the
7 identity of such Doe Defendants. Upon learning the true identities of the Doe
8 Defendants, Plaintiff anticipates either freely amending the operative complaint
9 or requesting leave from the Court to amend the operative complaint to identify
10 them.

11 5. The words "Defendants" or "Carter's" as used throughout this
12 pleading refers to Defendant Carter's, Inc., and/or any or all of the Doe
13 Defendants unless context dictates otherwise.

14 **III. JURISDICTION AND VENUE**

15 6. **Subject Matter Jurisdiction.** The Court has subject matter
16 jurisdiction over this civil action pursuant to 28 U.S.C. § 1332(a)(1) — i.e.,
17 traditional diversity jurisdiction — because the amount in controversy exceeds
18 the sum or value of \$75,000 (exclusive of interest and costs) and the matter is
19 between citizens of different states.

20 7. The Court has subject matter jurisdiction over this civil action
21 pursuant to 28 U.S.C. § 1332(d)(2) — i.e., Class Action Fairness Act jurisdiction
22 — because the amount in controversy exceeds the sum or value of \$5 million
23 (exclusive of interest and costs) and is a class action in which any member of a
24

1 class of plaintiffs is a citizen of a state different from any defendant.

2 8. **Personal Jurisdiction.** This Court may exercise personal
3 jurisdiction over each of the defendants pursuant to Washington State's long-arm
4 statute, RCW 4.28.185. This Court may exercise personal jurisdiction over out-
5 of-state Defendants because the claims alleged in this civil action arose from,
6 without limitation, the transaction by Defendants of any business within the State
7 of Washington (and/or within the Eastern District of Washington), and/or the
8 commission by Defendants of a tortious act within the State of Washington
9 (and/or within the Eastern District of Washington).

10 9. This Court may exercise personal jurisdiction over out-of-state
11 Defendants to the fullest extent allowed under the federal due process clause.
12 Defendants have certain minimum contacts with the State of Washington (and/or
13 with the Eastern District of Washington) such that the maintenance of this lawsuit
14 does not offend traditional notions of fair play and substantial justice. As alleged
15 in this pleading, Defendants have and continue to purposefully do some act or
16 consummate some transaction in the State of Washington (and/or in the Eastern
17 District of Washington), Plaintiff's claims arise from and/or are connected with
18 said act or transaction of Defendants, and the assumption of jurisdiction by this
19 Court does not offend traditional notions of fair play and substantial justice,
20 consideration being given to the quality, nature, and extent of the activity in the
21 State of Washington (and/or in the Eastern District of Washington), the relative
22 convenience of the parties, the benefits and protection of laws of the State of
23 Washington afforded the respective parties, and the basic equities of the situation.

1 10. Carter's owns and operates about eighteen Carter's-branded retail
2 stores in the State of Washington, including stores in Richland, Spokane and
3 Union Gap. Carter's operates a website, www.carters.com, by which Carter's
4 advertises and sells its goods, with said website being regularly seen by
5 Washington and Eastern District consumers and being regularly used by
6 Washington and Eastern District consumers to purchase goods from Carter's.

7 11. **Venue.** Venue is proper in the Eastern District of Washington under
8 28 U.S.C. § 1391(b) because, without limitation, a substantial part of the events
9 or omissions giving rise to Plaintiff's claims occurred in the Eastern District of
10 Washington. For example, but without limitation, Plaintiff Aguilar was in
11 Toppenish, Washington, when she received the Email and/or saw the subject line
12 of the Email that Defendants transmitted to her.

13 12. **Intra-District Assignment.** Plaintiff Aguilar resides in and she
14 received the unlawful Email from Carter's in Yakima County, which is within the
15 Yakima Division of the Eastern District of Washington.

16 **IV. FACTUAL ALLEGATIONS**

17 **A. Carter's Is A Retailer Which Manufacturers Almost All Of Its**
18 **Products.**

19 13. Carter's is the leading retailer and manufacturer of baby and young
20 children's clothing in the United States with over \$3 billion in annual U.S. sales.
21 Carter's sells its apparel under the CARTER'S trademark, among other marks.
22 According to the NPD Group, Inc., Carter's has more than three times the market
23 share of its nearest competitor. In the baby apparel segment in particular, Carter's
24

1 has nearly five times the market share of its nearest competitor.

2 14. Almost every product sold by Carter's is manufactured by Carter's in
3 the sense that Carter's designs the product and determines how many units will be
4 manufactured, on what schedule, and according to what specifications. While
5 Carter's may sub-contract the physical construction of its products to third
6 parties, Carter's is the manufacturer of almost all of its products in the sense that
7 Carter's decides what products to make, when, where, how and in what
8 quantities, materials, sizes and colors. When this pleading refers to Carter's as a
9 manufacturer, it does so in this sense of overall control over the creation of its
10 products.

11 15. Approximately 50% of Carter's U.S. sales are made directly to
12 consumers in Carter's company-owned retail stores. Carter's has approximately
13 734 Carter's-branded retail stores in the U.S., including 18 in the State of
14 Washington.

15 16. Approximately 10% of Carter's U.S. sales are made directly to
16 consumers on the Carter's website at www.carters.com.

17 17. Approximately 40% of Carter's revenues consist of wholesale
18 channel sales to third-party retailers. Carter's manufactures and then sells its
19 products at wholesale to other retailers or resellers. Thus, a consumer can
20 purchase Carter's-branded products at Macy's, Kohl's, J.C. Penney, and other
21 retailers (as well as from a Carter's retail store or from the Carter's website).

22 18. Many products manufactured by Carter's are *only* available at
23 Carter's company-owned retail stores or on the Carter's website, and are not also
24

1 available from other retailers or resellers.

2 **B. Plaintiff Maribell Aguilar, A Yakima County Resident, Received**
3 **An Email From Carter’s With A Subject Line Reading: “50-**
4 **70% OFF EVERYTHING”.**

5 19. On or about February 16, 2019, Carter’s initiated the transmission of
6 a commercial email to Plaintiff Maribell Aguilar (and to a class of Washington
7 consumers similarly situated to Ms. Aguilar) with a subject line which read in its
8 entirety: “50-70% OFF EVERTHING.” This transmission is referred to herein as
9 the “Email.”

10 20. The subject line of the Email did not contain an asterisk or other
11 indication that the words in the subject line had a special or invented meaning.

12 21. Ms. Aguilar received the Email, read the subject line of the Email
13 and understood the words “50-70% OFF” in the subject line of the Email to mean
14 that Carter’s was offering items at prices in its retail stores and on its website
15 which were 50% to 70% lower than Carter’s own regular or prevailing prices for
16 those items.

17 22. Separately, an ordinary consumer would understand the words “50-
18 70% OFF” in the subject line of the Email to mean that Carter’s was offering
19 items at prices that were 50% to 70% lower than Carter’s own regular or
20 prevailing prices for those items.

21 23. Ms. Aguilar received the Email, read the subject line of the Email
22 and understood the word “EVERYTHING” in the subject line of the Email to
23 mean that Carter’s was offering discounts on all of its products.

1 24. Separately, an ordinary consumer would understand the word
2 “EVERYTHING” in the subject line of the Email to mean that Carter’s was
3 offering discounts on all of its products.

4 25. Relying on Carter’s representation of “50-70% OFF EVERTHING”
5 in the subject line of the Email, Ms. Aguilar believed that Carter’s was holding a
6 sale at its retail stores and website at which Ms. Aguilar would receive a discount
7 of 50% to 70% off Carter’s regular or prevailing prices for all of its products. In
8 response to Carter’s representations in the subject line in this February 16, 2019,
9 Email, Ms. Aguilar visited and made purchases on February 19, 2019, at the
10 Carter’s retail store located at 1602 E. Washington Avenue, Union Gap,
11 Washington. Ms. Aguilar did not receive the actual discounts she was promised in
12 the Email subject line, and which she had reasonably expected, because in fact the
13 representations of the discounts were false.

14 **C. The Subject Line Reading “50-70% OFF EVERYTHING” Is**
15 **False Or Misleading.**

16 26. In violation of Washington State law, the Email’s subject line of “50-
17 70% OFF EVERTHING” contains false or misleading information. The words
18 “50-70% OFF” contain false or misleading information, the word
19 “EVERYTHING” contains false or misleading information, and/or the entire
20 subject line of “50-70% OFF EVERYTHING” contains false or misleading
21 information. (This pleading will refer to the terms “50-70% OFF” as “words,”
22 even though, strictly speaking, the terms are a combination of numbers,
23 typographic symbols and one word.)

1 **1. “50-70% OFF” is False or Misleading.**

2 27. **First**, the words “50-70% OFF” are false or misleading because Ms.
3 Aguilar and the ordinary consumer read and understood those words to mean a
4 discount from Carter’s regular or prevailing price. However, the discounts were
5 actually reductions from Carter’s Manufacturer’s Suggested Retail Price
6 (“MSRP”), and there was nothing in the Email subject line (such as an asterisk)
7 which communicated to Ms. Aguilar or an ordinary consumer that the advertised
8 discounts were reductions from something other than Carter’s regular or
9 prevailing price.

10 28. **Second**, the words “50-70% OFF” are false or misleading because, if
11 an ordinary consumer read or understood those words to mean a discount from
12 MSRP, an ordinary consumer would assume that the MSRP was set by the market
13 or by a bona fide third-party manufacturer in good faith. However, Carter’s is the
14 manufacturer, and Carter’s intentionally sets the MSRP at an inflated dollar
15 amount which Carter’s knows with certainty is grossly above the true market
16 price for the product. Meanwhile, Carter’s policy, as the manufacturer, is to give
17 each product a price tag with this self-created, inflated MSRP which is the same
18 regardless of whether the product is offered direct by Carter’s in its stores or on
19 its website, or offered by its resellers.

20 29. **Third**, the words “50-70% OFF” are false or misleading because, if
21 an ordinary consumer understood the discounts to be reductions from Carter’s
22 self-created MSRP, the discounts are false or misleading for the simple reason
23 that Carter’s has a policy of rarely if ever offering its products in its retail stores
24

1 or on its website at the purported MSRP.

2 30. Carter's policy and practice is to perpetually offer all of its products,
3 whether online or in-store, at a price at least 35% less (and usually between 40%
4 to 70% less) than its self-created MSRP. Meanwhile, based on investigation of
5 Plaintiff's counsel and on information and belief, Carter's online and in-store
6 sales prices and purported discounts are, by the company's own design, in
7 substantial parity with one another for those products that are offered through
8 both markets/channels.

9 31. In other words, Carter's has a policy and practice of not following its
10 own "suggested" retail price, because Carter's, as both the manufacturer and the
11 retailer, intentionally inflates the MSRP for the purpose of deceiving consumers
12 into believing they are receiving a significant discount in order to induce
13 consumers to purchase its products.

14 32. **Fourth**, the words "50-70% OFF" are false or misleading because,
15 on the rare occasions when Carter's offers an item at the MSRP, the item is
16 offered in bad faith to artificially "establish" a price from which discounts are
17 created and advertised. On information and belief, Carter's primary intent is to
18 artificially establish the MSRP for the purpose of exculpating itself from legal
19 liability for its pricing fraud, while at the same time cleverly ensuring that few if
20 any products are actually purchased by its customers at MSRP.

21 33. The indicia of bad faith on the part of Carter's include, without
22 limitation, that: (1) Carter's only, if ever, offers an item at MSRP on its website
23 (and *only* on its website) for at most a couple of weeks during an initial period;

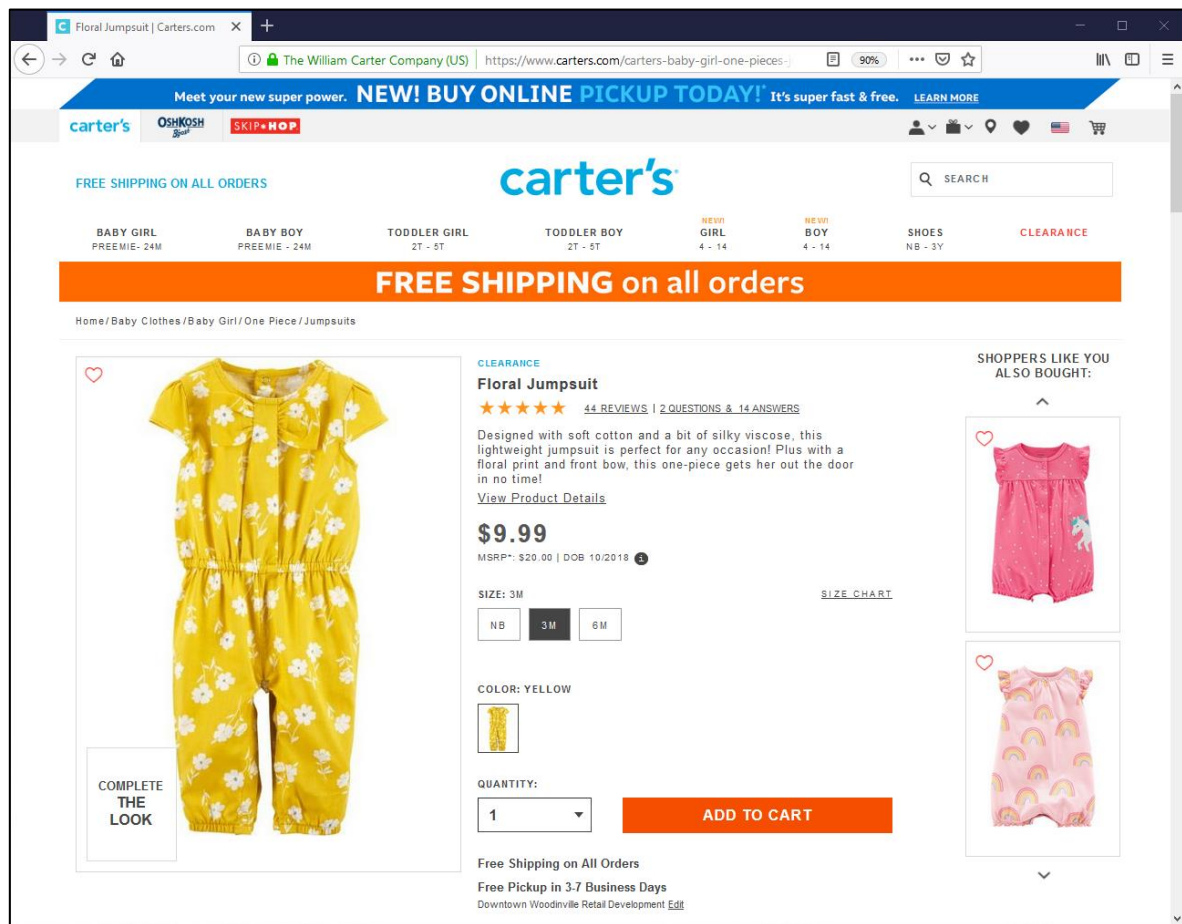
1 (2) Carter's has a policy to never or virtually never offer an item at MSRP in its
2 retail stores (where over 80% of Carter's direct sales occur); (3) if and when
3 Carter's offers an item at MSRP (only) on its website during such an initial
4 period, Carter's intentionally hides and buries the product on its website during
5 this time, purposefully making it very difficult for the ordinary website user to
6 find any such products being offered or sold at MSRP; (4) Carter's intentionally
7 engages in these practices in order to ensure its customers purchase few if any of
8 its products at MSRP; and/or (5) as a result, customers in fact purchase few if any
9 products from Carter's at MSRP.

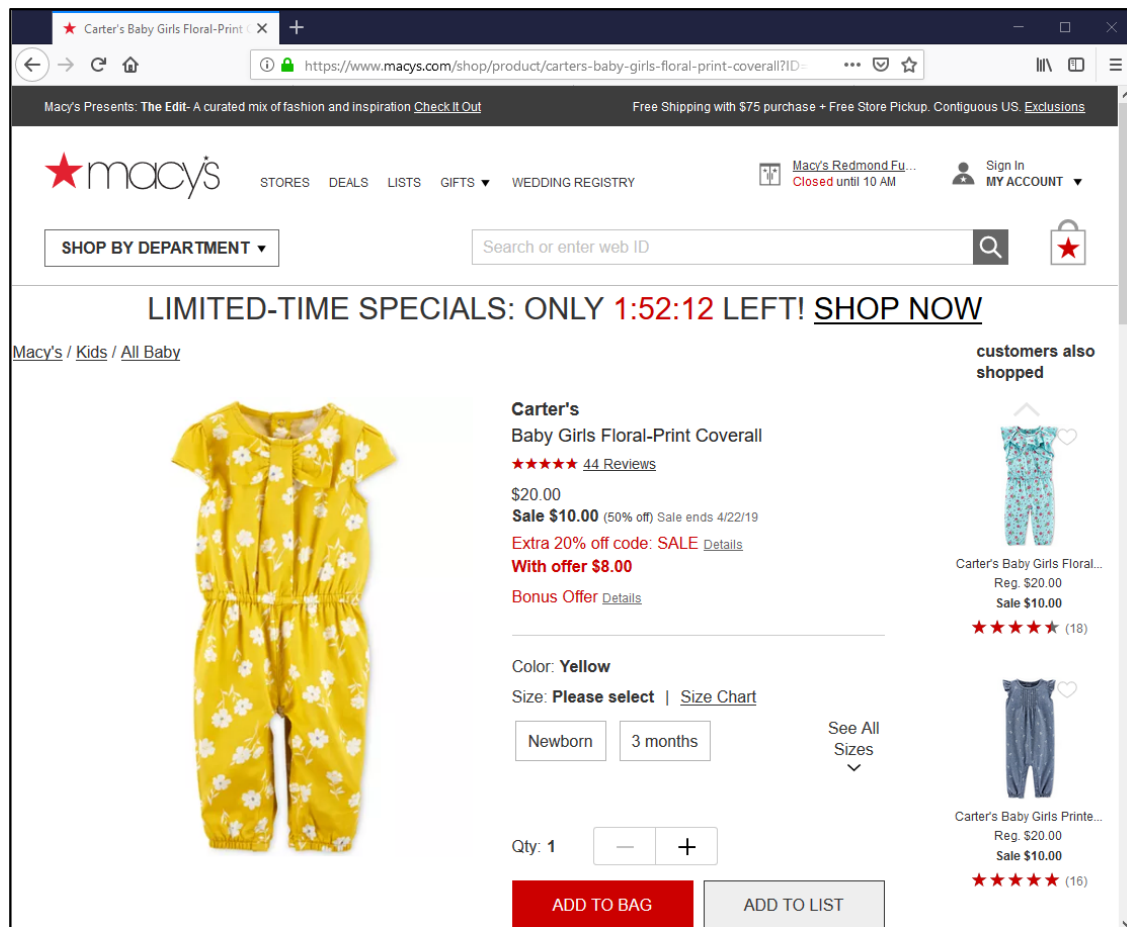
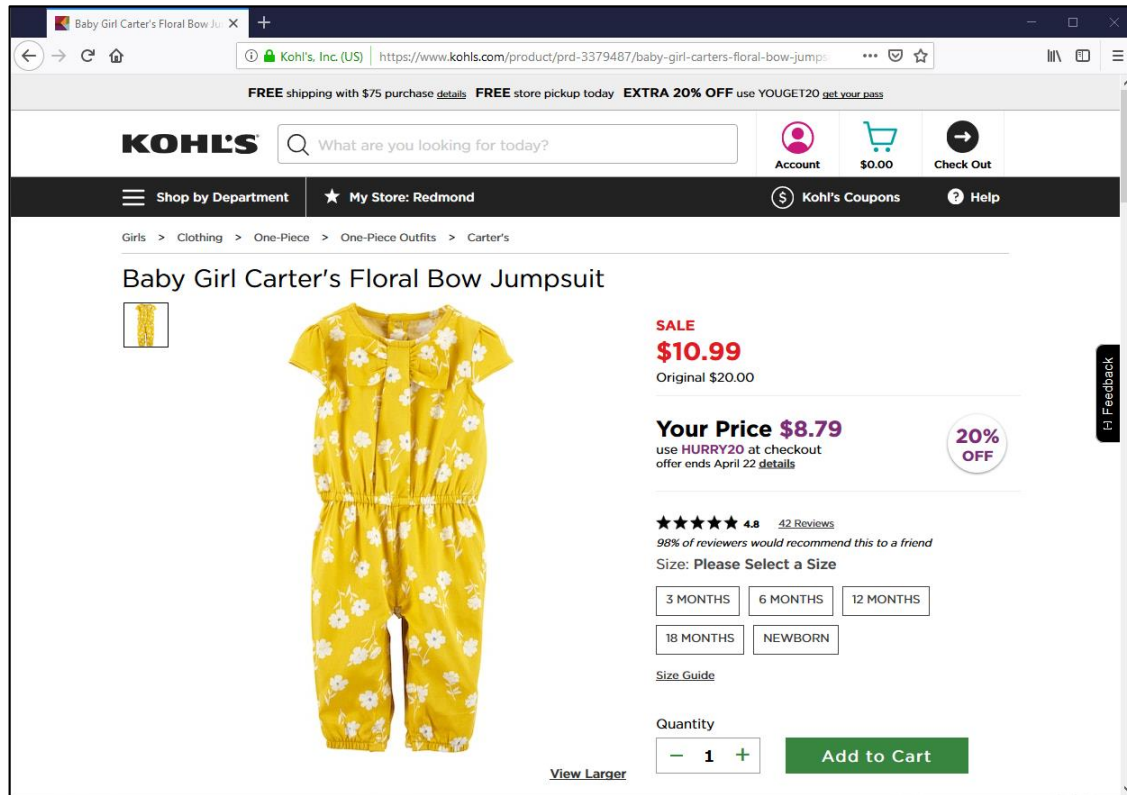
10 34. **Fifth**, the words "50-70% OFF" are also false or misleading because
11 Carter's resellers, e.g., third-party retailers such as Macy's, Kohl's, and J.C.
12 Penney, likewise rarely if ever offer or sell the products at Carter's MSRP.

13 35. Phrased differently, Carter's cannot claim that its self-created MSRP
14 is a market price. Based on investigation of Plaintiff's counsel, none of the major
15 retailers in the children's apparel market regularly offers or sells Carter's products
16 at Carter's self-created MSRP. (The conduct of the Carter's resellers is logical; if
17 the resellers offered or sold in good faith the Carter's products at the MSRP, then
18 the resellers would be perpetually undercut and would lose sales to Carter's,
19 whose own 734 retail stores and website have a policy and practice of
20 consistently offering the products for greater than 35% below MSRP.)

21 36. Below is an example which demonstrates how Carter's products are
22 typically offered in the consumer marketplace, by both Carter's itself, and by
23 Carter's resellers, at a similar (and significant) discount to the inflated and
24

1 fictional MSRP provided by Carter's. The screenshots below were taken on April
 2 22, 2019, of the identical Carter's-branded Floral Jumpsuit/Coverall ("Jumpsuit")
 3 available direct from Carter's (see the first screenshot), and also from Carter's
 4 resellers Kohl's (see the second screenshot) and Macy's (see the third
 5 screenshot):





CLASS ACTION COMPLAINT FOR
DAMAGES AND INJUNCTIVE RELIEF- 13

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1 37. The MSRP or reference price was \$20.00 at all three retailers, which
2 reflects Carter's policy, as the manufacturer, to give each product a price tag with
3 an MSRP which is the same regardless of whether the product is offered direct by
4 Carter's in its stores or website, or by its resellers.

5 38. All three retailers offered the Jumpsuit for between \$8.00 and \$9.99
6 on this day, at a supposed "discount" of at least 50% from the MSRP or reference
7 price. Based on investigation of Plaintiff's counsel, all three retailers used and
8 continue to use the Carter's-provided MSRP as the advertised reference price for
9 virtually all Carter's-branded products, and all three retailers consistently offer
10 Carter's-branded products at a perpetual "discount" of between 40% to 70% from
11 Carter's inflated and fictional MSRP.

12 39. Carter's is fully aware, expects, and/or intends that its resellers
13 virtually never offer Carter's products at MSRP, and that its resellers instead
14 perpetually offer Carter's products at a "discount" of 40% to 70% from the
15 inflated and fictional MSRP.

16 40. **In sum**, neither Ms. Aguilar nor an ordinary Washington consumer
17 did or would understand the words "50-70% OFF" in the Email's subject line to
18 refer to a discount from a self-created MSRP which Carter's created in bad faith
19 and which neither Carter's nor its resellers treat as a real, bona fide price.

1 **2. “EVERYTHING” is False or Misleading.**

2 41. The information in the subject line of the Email reading
3 “EVERYTHING” is also false or misleading.

4 42. Ms. Aguilar understood the word “EVERYTHING” to mean that
5 Carter’s was offering discounts on all of its products in its stores and on its
6 website.

7 43. Separately, an ordinary consumer would understand the word
8 “EVERYTHING” to mean that Carter’s was offering discounts on all of its
9 products.

10 44. In reality, Carter’s was not offering discounts on all of its products.
11 Carter’s excluded many products from the sale advertised in the Email subject
12 line. At least 500 items were excluded from the sale advertised in the Email
13 subject line and potentially upward of 1,700 items were excluded. But there is
14 nothing in the Email’s subject line (such as an asterisk) to warn consumers that
15 Carter’s had assigned a special or invented meaning to the word
16 “EVERYTHING”.

17 **D. Carter’s Has Violated The Law, And Continues To Violate The**
18 **Law, With Regard To A Class Of Washington Consumers.**

19 45. Ms. Aguilar is not alone. Carter’s transmitted the Email with the
20 unlawful subject line, as well as many other emails with similarly false or
21 misleading subject lines, to thousands, perhaps tens of thousands, of persons in
22 Washington State. A principal intention of Carter’s in using the false and
23 misleading subject lines in such emails was to trick the email recipients into
24

1 falsely believing that Carter's was holding a big sale (e.g., "50-70% OFF
2 EVERYTHING") with significant discounts from its normal prices, and to
3 thereby induce the email recipients to purchase products from Carter's stores or
4 the Carter's website.

5 46. These recipients comprise a certifiable class, are persons whom Ms.
6 Aguilar seeks to represent in this class action, and are persons who are each
7 entitled to damages for each unlawful email Carter's transmitted to them.

8 47. Plaintiff's counsel has conducted an extensive investigation into
9 Carter's misconduct and bases the allegations of this pleading upon, among other
10 things, the findings of the investigation.

11 48. Plaintiff's counsel has been monitoring Carter's website since
12 October 15, 2015. Plaintiff's counsel has assembled a comprehensive historical
13 database of daily prices and screenshots of approximately 900,000 daily offerings
14 for thousands of products over these 1,293 days.

15 49. The data demonstrates that Carter's rarely if ever offered products at
16 a price which would render the "50-70% OFF" language accurate.

17 50. Based on investigation and on information and belief, the Email of
18 February 16, 2019, is not the only time that Carter's included a false or
19 misleading "percentage off" statement (or similar statement) in the subject line of
20 a commercial email message sent to Ms. Aguilar or to other Washington
21 consumers; in fact, it is common for Carter's to transmit emails to Washington
22 residents with subject lines similar to the Email's subject line.

23 51. Based on investigation and on information and belief, Carter's
24

1 continues to transmit (and, absent an injunction, will continue to transmit)
2 commercial email messages to Washington consumers which contain false or
3 misleading “percentage off” statements (or similar statements) in the subject line.

4 52. Based on investigation and on information and belief, the Email of
5 February 16, 2019, is not the only time that Carter’s included a false or
6 misleading “everything” statement or similar wording in the subject line of a
7 commercial email message sent to Ms. Aguilar or to other Washington
8 consumers.

9 53. Based on investigation and on information and belief, Carter’s
10 continues to transmit (and, absent an injunction, will continue to transmit)
11 commercial email messages to Washington consumers which contain false or
12 misleading “everything” statements (or similar statements) in the subject line.

13 54. The nature of Carter’s misconduct is non-obvious and/or obscured
14 from public view, and neither Plaintiff nor the members of the putative class
15 could have, through the use of reasonable diligence, learned of the accrual of her
16 and their claims against Carter’s at an earlier time. This Court should, at the
17 appropriate time, apply the discovery rule to extend the applicable limitations
18 period (and the corresponding class period) to the date on which Carter’s
19 commenced transmitting emails which violated the Washington Consumer
20 Protection Act or the Washington Commercial Electronic Communication Act in
21 the manner described herein even if such a date is beyond the statutory limitations
22 period otherwise applied to such claims.

1 **V. CLASS ACTION ALLEGATIONS**

2 55. Plaintiff Aguilar brings this class-action lawsuit on behalf of herself
3 and on behalf of the members of the following class (the “Class”):

4 **All residents of the State of Washington who, within**
5 **the applicable limitations period, received an email**
6 **from Carter’s that contained: (a) a percentage off**
7 **statement (or similar statement) in the subject line;**
8 **and/or (b) the word “everything” or a similar term in**
9 **the subject line when one or more products were**
10 **excluded from the discount.**

11 56. Specifically excluded from the Class are each defendant, any entity
12 in which a defendant has a controlling interest or which has a controlling interest
13 in a defendant, a defendant’s agents and employees and attorneys, the bench
14 officers to whom this civil action is assigned, and the members of each bench
15 officer’s staff and immediate family.

16 57. ***Numerosity.*** Plaintiff does not know the exact number of Class
17 members but is informed and believes that the Class easily comprises 5,000
18 Washington State residents and could, by the date of entry of Judgment, number
19 in excess of 20,000 Washington State residents. As such, Class members are so
20 numerous that joinder of all members is impracticable.

21 58. ***Commonality and Predominance.*** Well-defined, nearly identical
22 legal or factual questions affect the members of the Class. These questions
23 predominate over questions that might affect individual Class members. These
24 common questions include, but are not limited to, the following:

1 a. The subject line and contents of Carter's promotional emails
2 sent to residents of the State of Washington;

3 b. Carter's policies and actions regarding the subject line and
4 contents of its promotional emails;

5 c. The accuracy of the information in the subject line of Carter's
6 promotional emails;

7 d. Whether the pled conduct of Carter's is injurious to the public
8 interest;

9 e. Whether Carter's should be ordered to pay statutory damages;
10 and/or

11 f. Whether Carter's should be enjoined from further engaging in
12 the misconduct alleged herein.

13 59. The prosecution of separate actions by individual members of the
14 Class would create a risk of inconsistent or varying adjudications with respect to
15 individual members of the Class which would establish incompatible standards of
16 conduct for the party opposing the class.

17 60. The party opposing the Class has acted or refused to act on grounds
18 generally applicable to the Class, thereby making appropriate final injunctive
19 relief or corresponding declaratory relief with respect to the Class as a whole.

20 61. **Typicality.** Plaintiff's claims are typical of Class members' claims.
21 Plaintiff and Class members all received emails from Carter's with false or
22 misleading information in the subject line. Plaintiff and Class members all
23 received emails from Carter's with false or misleading information in the subject
24

1 line regarding the manner in which purported percentage off discounts were
2 calculated and/or whether the purported discounts applied to all of Carter's
3 products.

4 62. **Adequacy.** Plaintiff will fairly and adequately protect Class
5 members' interests. Plaintiff has no interests antagonistic to Class members'
6 interests. Plaintiff has retained counsel who has considerable experience and
7 success in prosecuting complex class action and consumer protection cases.

8 63. **Superiority.** A class action is the superior method for fairly and
9 efficiently adjudicating this controversy for the following reasons, without
10 limitation:

11 a. Class members' interests are relatively small compared to the
12 burden and expense required to litigate each of their claims individually, so it
13 would be impracticable for Class members to seek individual redress for each
14 defendant's illegal and deceptive conduct;

15 b. Even if Class members could afford individual litigation, the
16 court system could not. Individual litigation creates the potential for inconsistent
17 or contradictory judgments and increases the delay and expense to all parties and
18 to the court system. By contrast, a class action presents far fewer management
19 difficulties and provides the benefits of single adjudication, economy of scale,
20 and comprehensive supervision by a single court; and

21 c. Plaintiff anticipates no unusual difficulties in managing this
22 class action.
23
24

CLAIMS

COUNT I

**Violation of the Washington Consumer Protection Act
(RCW Chapter 19.86)
(For Damages and All Other Available Relief)
AGAINST ALL DEFENDANTS**

64. Plaintiff realleges and incorporates by reference all paragraphs alleged hereinbefore.

65. Plaintiff Aguilar pleads this count in three separate capacities: in her individual capacity, as a private attorney general seeking the imposition of public injunctive relief, and/or as a putative class representative serving on behalf of all others similarly situated.

66. The Washington Consumer Protection Act (the “CPA”), RCW 19.86, was first enacted in 1961 and is Washington’s principal consumer protection statute. The CPA “replaces the now largely discarded standard of *caveat emptor* with a standard of fair and honest dealing.” Washington Pattern Jury Instruction Civil No. 310.00 (Consumer Protection Act — Introduction).

67. The CPA’s primary substantive provision declares unfair methods of competition and unfair or deceptive acts or practices to be unlawful. RCW 19.86.020. “Private rights of action may now be maintained for recovery of actual damages, costs, and a reasonable attorney’s fee. RCW 19.86.090. A private plaintiff may be eligible for treble damages Private consumers may obtain injunctive relief, even if the injunction would not directly affect the individual’s own rights. RCW 19.86.090.” Washington Pattern Jury Instruction Civil No.

1 310.00 (Consumer Protection Act — Introduction).

2 68. The CPA recognizes and incorporates *per se* violations. The
3 Washington Legislature routinely prohibits certain specified conduct but, instead
4 of creating a new and independent private right of action to enforce the
5 prohibition, the Legislature deems the unlawful conduct to be a *per se* violation of
6 the CPA. If a defendant engages in that unlawful conduct, a plaintiff may file a
7 CPA complaint alleging the *per se* violation and seek the remedies available
8 under the CPA and also cumulatively seek the remedies available under the
9 statute which forbids the *per se* violation. *See* Washington Pattern Jury
10 Instruction Civil No. 310.03 (*Per Se* Violation of Consumer Protection Act) and
11 Appendix H (Consumer Protection Act *Per Se* Violations).

12 69. A plaintiff can plead a violation of the Washington Consumer
13 Protection Act by pleading that the CPA was violated *per se* due to a violation of
14 the Washington Commercial Electronic Mail Act. *See* RCW 19.190.030(1)(b) (“It
15 is a violation of the consumer protection act, chapter 19.86 RCW . . . to initiate
16 the transmission of a commercial electronic mail message that . . . [c]ontains false
17 or misleading information in the subject line.”); Washington Statutes of 1998,
18 chapter 149, § 4 (approved by Governor on March 25, 1998).

19 70. The Washington Commercial Electronic Mail Act (“CEMA”)
20 prohibits a person from initiating the transmission of a commercial electronic
21 mail message to an electronic mail address that the sender knows, or has reason to
22 know, is held by a Washington resident that contains false or misleading
23 information in the subject line. RCW 19.190.020(1)(b).

1 71. A plaintiff who successfully pleads and proves a CEMA violation as
2 a *per se* violation of the CPA may recover the remedies available under the CPA
3 (e.g., actual damages, increased damages of up to treble actual damages (subject
4 to a statutory maximum), injunctive relief, attorneys' fees and costs (RCW
5 19.86.090)) and also cumulatively the remedies available under CEMA (e.g.,
6 statutory damages of \$500 per email sent in violation of CEMA, or actual
7 damages, whichever is greater; and injunctive relief (RCW 19.190.040, RCW
8 19.190.090)).

9 72. On or about February 16, 2019, Defendants initiated the transmission
10 of a commercial electronic mail message to Plaintiff Aguilar (the "Email"). The
11 Email was an electronic mail message, in that it was an electronic message sent to
12 an electronic mail address; the Email from Defendants also referred to an internet
13 domain, whether or not displayed, to which an electronic mail message can or
14 could be sent or delivered.

15 73. Defendants sent the Email for the purpose of promoting goods or
16 services for sale or lease. Defendants were the original sender of the Email.

17 74. Plaintiff Aguilar received the Email at her electronic mail address,
18 which is the destination, commonly expressed as a string of characters, at which
19 she receives and to which electronic mail may be sent or delivered.

20 75. Defendants initiated the transmission of the Email to Ms. Aguilar's
21 electronic mail address, which was an electronic mail address that Defendants
22 knew, or had reason to know, was held by a Washington State resident, i.e., Ms.
23 Aguilar.

1 76. Ms. Aguilar was the recipient of the Email.

2 77. At all relevant times, Defendants knew that the intended recipient
3 (Ms. Aguilar) was a resident of the State of Washington because, without
4 limitation, Defendants possessed actual knowledge of Ms. Aguilar's state of
5 residence, Defendants possessed constructive knowledge of Ms. Aguilar's state of
6 residence, information was available to Defendants upon request from the
7 registrant of the internet domain name contained in the recipient's electronic mail
8 address, and/or Defendants otherwise knew or should have known or had reason
9 to know that Ms. Aguilar was a resident of the State of Washington.

10 78. The subject line of the Email read in its entirety: "50-70% OFF
11 EVERYTHING". The subject line did not contain an asterisk or other indication
12 that the words in the subject line had a special or invented meaning.

13 79. In violation of the Washington Consumer Protection Act (as based
14 *per se* upon a violation of the Washington Commercial Electronic Mail Act) and
15 for the reasons alleged hereinabove, the subject line "50-70% OFF
16 EVERTHING" contained false or misleading information.

17 80. Generally, a plaintiff pleading a claim under the Washington
18 Consumer Protection Act must plead five necessary elements: (1) an unfair or
19 deceptive act or practice (2) in trade or commerce (3) that affects the public
20 interest, (4) injury to plaintiff's business and property, and (5) causation. *Wright*
21 *v. Lyft, Inc.*, 189 Wash.2d 718, 728 (2017). Because Plaintiff alleges a *per se* CPA
22 violation by alleging a CEMA violation, all or some of these five elements are, as
23 elaborated below, deemed to be satisfied and/or nullified as a matter of law.

1 *Wright v. Lyft, Inc.*, 189 Wash.2d 718, 724 (2017). However, Plaintiff can and
2 hereby does adequately plead every element of this CPA claim even if the
3 elements were not deemed to be satisfied and/or nullified as a matter of law.

4 81. **CPA Element 1: “An Unfair Or Deceptive Act Or Practice.”** The
5 existence of an unfair or deceptive act or practice (CPA element 1) is deemed to
6 be satisfied by the pleading of a CEMA violation as a *per se* violation of the CPA.
7 *Wright v. Lyft, Inc.*, 189 Wash.2d 718, 724 (2017) (“The statute also established
8 the first three elements of a CPA claim (1) unfair or deceptive act (2) occurring in
9 trade or commerce that affects (3) the public interest . . .”).

10 82. In the alternative and/or separately, Defendants’ misconduct as
11 alleged herein constitutes an unfair or deceptive act or practice (CPA element 1)
12 because the information in the subject line of the Email had a tendency or
13 capacity to mislead or deceive a substantial portion of the public.

14 83. **CPA Element 2: “In Trade Or Commerce.”** The existence of an
15 unfair or deceptive act or practice occurring in trade or commerce (CPA element
16 2) is deemed to be satisfied by the pleading of a CEMA violation as a *per se*
17 violation of the CPA. *Wright v. Lyft, Inc.*, 189 Wash.2d 718, 724 (2017) (“The
18 statute also established the first three elements of a CPA claim (1) unfair or
19 deceptive act (2) occurring in trade or commerce that affects (3) the public
20 interest . . .”).

21 84. In the alternative and/or separately, Defendants’ misconduct as
22 alleged herein occurred in the conduct of trade or commerce (CPA element 2)
23 because Defendants sold or offered for sale the relevant goods in the State of
24

1 Washington or to persons in Washington and/or in engaged in commerce directly
2 or indirectly affecting the people of the State of Washington.

3 **85. CPA Element 3: “That Affects The Public Interest.”** The
4 existence of the public interest element (CPA element 1) is deemed to be satisfied
5 by the pleading of a CEMA violation as a *per se* violation of the CPA. *Wright v.*
6 *Lyft, Inc.*, 189 Wash.2d 718, 724 (2017) (“The statute also established the first
7 three elements of a CPA claim (1) unfair or deceptive act (2) occurring in trade or
8 commerce that affects (3) the public interest . . .”).

9 **86.** In the alternative and/or separately, Defendants’ misconduct alleged
10 herein is injurious to the public interest (CPA element 3) in that the misconduct:
11 (1) violates a statute (specifically, the Washington Commercial Electronic
12 Communications Act, RCW 19.190) which incorporates the Washington
13 Consumer Protection Act (RCW Chapter 19.86) (with said incorporation being
14 codified at, without limitation, RCW 19.190.030(1) and RCW 19.190.100); (2)
15 violates a statute that contains a specific legislative declaration of public interest
16 impact (e.g., RCW 19.190.030(3) and RCW 19.190.100); (3) injured other
17 persons (e.g., the other members of the Class); (4) had the capacity to injure other
18 persons (e.g., the other members of the Class); and/or (5) has the capacity to
19 injure other persons (e.g., the other members of the Class).

20 **87. CPA Element 4: “Injury To Plaintiff’s Business And Property.”**
21 The existence of the element of injury to business or property (CPA element 4) is
22 deemed as a matter of law to be satisfied by and/or to be nullified by CEMA. *See*
23 *Wright v. Lyft, Inc.*, 189 Wash.2d 718, 729 (2017) (“RCW 19.190.040 — the
24

1 provision does not condition the award of damages on proving either injury or
2 causation. In fact, damages for CEMA violations are *automatic*.”) (emphasis in
3 original); *Gragg v. Orange Cab Co., Inc.*, 145 F.Supp. 3d 1046, 1053 (W.D.
4 Wash. 2015) (Lasnik, J.) (“the only way to give effect to the legislature’s stated
5 intent is to construe the liquidated damages provision [of CEMA] as establishing
6 the injury and causation elements of a CPA claim”).

7 88. In the alternative and/or separately with regard to injury to Plaintiff’s
8 business or property (CPA element 4), Ms. Aguilar was injured (and/or members
9 of the Class were injured) by the loss of the time she spent reviewing the subject
10 line of the Email, opening and looking at the Email, and/or investigating the
11 claims made in the Email. Ms. Aguilar was injured (and/or members of the Class
12 were injured) in that the subject line of the Email created an expectancy that she
13 would receive a discount of 50% to 70% off of the regular or prevailing price of
14 every Carter’s product, but she did not receive that expectancy when she
15 purchased from Carter’s in response to the subject line. Ms. Aguilar was injured
16 (and/or members of the Class were injured) because the false or deceptive subject
17 line of the email caused Ms. Aguilar to buy more than she otherwise would have
18 bought and to pay more than she otherwise would have paid. Ms. Aguilar was
19 injured (and/or members of the Class were injured) because the products she
20 purchased in response to the Email were not in fact worth the amount that
21 Defendants represented to her. Ms. Aguilar was also injured (and/or members of
22 the Class were also injured) in that the Email used resources on her electronic
23 device and in her home, utilized memory on her electronic device and/or email
24

1 service, depleted battery power from the electronic device, consumed electricity
2 used to re-charge the device after Email-caused depletion, and/or caused wear and
3 tear on her device, router, wires and/or other equipment. (Ms. Aguilar is not
4 alleging that Defendants injured her physically or emotionally.)

5 89. **CPA Element 5: “Causation.”** The existence of causation (CPA
6 element 5) is deemed as a matter of law to be satisfied by and/or to be nullified by
7 CEMA. *See Wright v. Lyft, Inc.*, 189 Wash.2d 718, 729 (2017) (“RCW
8 19.190.040 — the provision does not condition the award of damages on proving
9 either injury or causation. In fact, damages for CEMA violations are *automatic.*”) (emphasis in original); *Gragg v. Orange Cab Co., Inc.*, 145 F.Supp. 3d 1046,
10 1053 (W.D. Wash. 2015) (Lasnik, J.) (“the only way to give effect to the
11 legislature’s stated intent is to construe the liquidated damages provision [of
12 CEMA] as establishing the injury and causation elements of a CPA claim”).

13 90. In the alternative and/or separately with regard to causation (CPA
14 element 5), the false or misleading information in the subject line of the Email
15 was a cause in direct sequence (unbroken by any new independent cause) which
16 produced each injury complained of and without which such injury would not
17 have happened. But for Defendants’ transmitting to Ms. Aguilar the Email with
18 the false or misleading information in the subject line, Ms. Aguilar would not
19 have been injured in the manner alleged herein.

20 91. Defendants’ misconduct as alleged herein was not performed in good
21 faith. Defendants’ misconduct as alleged herein was not reasonable in relation to
22 the development and preservation of business.
23

1 92. The balance of the equities favors the entry of permanent injunctive
2 relief against Defendants. Plaintiff, the members of the Class and the general
3 public will be irreparably harmed absent the entry of permanent injunctive relief
4 against Defendants. Plaintiff, the members of the Class and the general public
5 lack an adequate remedy at law. A permanent injunction against Defendants is in
6 the public interest. Defendants' unlawful behavior is, based on information and
7 belief, ongoing as of the date of the filing of this pleading; absent the entry of a
8 permanent injunction, Defendants' unlawful behavior will not cease and, in the
9 unlikely event that it voluntarily ceases, is likely to reoccur.

10
11 **COUNT II**

12 **Violation of the Washington Commercial Electronic Mail Act**
13 **RCW Chapter 19.190**
14 **(Injunctive and Related Relief Only—No Damages Sought)**
15 **AGAINST ALL DEFENDANTS**

16 93. Plaintiff realleges and incorporates by reference all paragraphs
17 alleged hereinbefore.

18 94. Plaintiff Aguilar pleads this count in three separate capacities: in her
19 individual capacity, as a private attorney general seeking the imposition of public
20 injunctive relief and/or as a putative class representative serving on behalf of all
21 others similarly situated.

22 95. The Washington Commercial Electronic Mail Act ("CEMA"), RCW
23 19.190, creates an independent but limited private of right of action which can be
24 asserted by, among others, a person who is the recipient of a commercial
electronic mail message which contains false or misleading information in the

1 subject line. RCW 19.190.030(1)(b). A plaintiff who successfully alleges and
2 proves such a violation may obtain, among other things, an injunction against the
3 person who initiated the transmission. RCW 19.190.090(1).

4 96. It is Plaintiff's intent in this count to plead an independent CEMA
5 cause of action only to the limited extent that it is recognized by law, e.g., when a
6 plaintiff seeks injunctive relief but not damages. *Wright v. Lyft, Inc.*, 189 Wash.2d
7 718, 728 n. 3 (2017) ("we note that a plaintiff may bring an action to enjoin any
8 CEMA violation"); *Gragg v. Orange Cab Co.*, 145 F. Supp.3d 1046, 1052 (W.D.
9 Wash. 2015).)

10 97. On or about February 16, 2019, Defendants initiated the transmission
11 of a commercial electronic mail message to Plaintiff Aguilar (the "Email"). The
12 Email was an electronic mail message, in that it was an electronic message sent to
13 an electronic mail address; the Email from Defendants also referred to an internet
14 domain, whether or not displayed, to which an electronic mail message can or
15 could be sent or delivered.

16 98. Defendants sent the Email for the purpose of promoting goods or
17 services for sale or lease. Defendants were the original sender of the Email.

18 99. Plaintiff Aguilar received the Email at her electronic mail address,
19 which is the destination, commonly expressed as a string of characters, at which
20 she receives and to which electronic mail may be sent or delivered.

21 100. Defendants initiated the transmission of the Email to Ms. Aguilar's
22 electronic mail address, which was an electronic mail address that Defendants
23 knew, or had reason to know, was held by a Washington State resident, i.e., Ms.

1 Aguilar.

2 101. Ms. Aguilar was the recipient of the Email.

3 102. At all relevant times, Defendants knew that the intended recipient
4 (Ms. Aguilar) was a resident of the State of Washington because, without
5 limitation, Defendants possessed actual knowledge of Ms. Aguilar's state of
6 residence, Defendants possessed constructive knowledge of Ms. Aguilar's state of
7 residence, information was available to Defendants upon request from the
8 registrant of the internet domain name contained in the recipient's electronic mail
9 address, and/or Defendants otherwise knew or should have known or had reason
10 to know that Ms. Aguilar was a resident of the State of Washington.

11 103. The subject line of the Email read in its entirety: "50-70% OFF
12 EVERYTHING". The subject line did not contain an asterisk or other indication
13 that the words in the subject line had a special or invented meaning.

14 104. In violation of the Washington Commercial Electronic Mail Act and
15 for the reasons alleged hereinabove, the subject line "50-70% OFF
16 EVERTHING" contained false or misleading information.

17 105. The balance of the equities favors the entry of permanent injunctive
18 relief against Defendants. Plaintiff, the members of the Class and the general
19 public will be irreparably harmed absent the entry of permanent injunctive relief
20 against Defendants. Plaintiff, the members of the Class and the general public
21 lack an adequate remedy at law. A permanent injunction against Defendants is in
22 the public interest. Defendants' unlawful behavior is, based on information and
23 belief, ongoing as of the date of the filing of this pleading; absent the entry of a
24

1 permanent injunction, Defendants' unlawful behavior will not cease and, in the
2 unlikely event that it voluntarily ceases, is likely to reoccur.

3
4 **PRAYER FOR RELIEF**

5 Plaintiff MARIBELL AGUILAR, on behalf of herself individually, as a
6 private attorney general and/or on behalf of the Class of all others similarly
7 situated hereby respectfully requests that this Court order relief and enter
8 judgment against Defendant Carter's, Inc., and/or Defendants Does 1 through 10,
9 inclusive, individually and/or jointly and/or severally and/or as otherwise
10 appropriate, as follows:

11 **As To The First Claim (Violation of the Washington Consumer**
12 **Protection Act):**

- 13 1. For an order certifying the proposed Class and appointing Plaintiff
14 and her counsel to represent the Class;
- 15 2. For actual damages pursuant to, without limitation, RCW 19.86.090;
- 16 3. For an increase in the award of actual damages of up to treble the
17 actual damages (up to the statutory maximum of \$25,000 to be awarded to
18 Plaintiff and to each member of the Class for each instance in which Defendants
19 initiated the transmission of a commercial electronic mail message which was
20 received by a Washington resident and which contained false or misleading
21 information in the subject line) pursuant to, without limitation, RCW 19.86.090;
- 22 4. For damages which are the greater of (a) the actual damages incurred
23 by Plaintiff and each member of the Class or (b) the statutory damages of \$500 to
24

1 be awarded to Plaintiff and to each member of the Class for each instance in
2 which Defendants initiated the transmission of a commercial electronic mail
3 message which was received by a Washington resident and which contained false
4 or misleading information in the subject line (an amount of statutory damages
5 which will be proven at trial but which Plaintiff estimates will be at least \$10
6 million per violative email) pursuant to, without limitation, RCW 19.190.040;

7 5. For nominal damages;

8 6. For an order that Defendants be permanently enjoined from the
9 unlawful conduct alleged herein pursuant to, without limitation, RCW 19.86.090;

10 **As To The Second Claim (Violation of the Washington Commercial**
11 **Electronic Mail Act):**

12 7. For an order certifying the proposed Class and appointing Plaintiff
13 and her counsel to represent the Class;

14 8. For an order that Defendants be permanently enjoined from the
15 unlawful conduct alleged herein pursuant to, without limitation, RCW
16 19.190.090(1);

17 **As To Each And Every Claim:**

18 9. For an order certifying the proposed Class and appointing Plaintiff
19 and her counsel to represent the Class;

20 10. For an order that Defendants be permanently enjoined from the
21 unlawful conduct alleged herein;

22 11. For an order that the Court retain jurisdiction to police Defendants'
23 compliance with the permanent injunctive relief;

1 12. For pre-judgment and/or post-judgment interest to the extent allowed
2 by law;

3 13. For attorneys' fees to the extent allowed by law;

4 14. For costs to the extent allowed by law; and/or

5 15. For any other relief the Court deems just and proper, including,
6 without limitation, temporary, preliminary and/or permanent injunctive relief.

7
8 **JURY DEMAND**

9 Plaintiff Maribell Aguilar demands trial by jury on all issues so triable.

10 DATED this 29th day of April, 2019.

11 Presented by:

12 HATTIS & LUKACS

13
14 By: 
15 Che Corrington

16 Che Corrington, WSBA No. 54241

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